STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 21, 2010
v	No. 294252 Jackson Circuit Court
RUSTY LEE BARKER, Defendant-Appellant.	LC No. 08-005424-FH

Before: MURPHY, C.J., and METER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial conviction of second-degree criminal sexual conduct (CSC 2), MCL 750.520c(1)(b)(*ii*) (sexual contact with person who is related by blood or affinity and who is at least 13 but less than 16 years of age). He was sentenced as a second-habitual offender, MCL 769.10, to 5 to 15 years' imprisonment. We affirm.

Defendant dated, lived with, and later married the victim's mother. In 1998, when the victim was eight years old, defendant began touching her vagina and breasts with his hands and penis when she was home alone with him. Defendant warned the victim not to tell anyone. The sexual molestation continued until the victim was about 14 years old. The victim testified that during the early years of the molestation, defendant would sexually assault her once every few days. Defendant was still having sexual contact with the victim when she was 13 years old, but it occurred less frequently, "[m]aybe once every couple of weeks." The victim eventually informed her mother because she feared that defendant would start sexually molesting the victim's five-year-old niece. Defendant was kicked out of the family home and the police were contacted. In the felony complaint, warrant, and information, the date of the offense is listed as having occurred between October 2003 and October 2004. The victim was born on October 3, 1990, making her 13 years old on October 3, 2003.

On appeal, defendant first argues, citing MRE 404(b), that the trial court erred in admitting prior-bad-acts evidence which showed that defendant had sexually molested the victim from ages 8 through 12, which time period was not encompassed in the CSC 2 charge. The CSC 2 charge was brought under MCL 750.520c(1)(b)(*ii*), which prohibits sexual contact with a person who is related by blood or affinity and who is at least 13 but less than 16 years of age. Defendant also argues that the trial court erred in allowing the victim to testify that she came forward with her claims against defendant out of concern that he might molest the victim's niece.

At the commencement of trial, both of these evidentiary issues were addressed by the trial court. The court ruled that evidence of prior sexual acts between defendant and the victim was relevant and that its probative value was not substantially outweighed by the danger of unfair prejudice. Therefore, the evidence was admissible. The discussion below of the prior bad acts focused on MRE 404(b) and MRE 401-403. There were also arguments regarding the application of our Supreme Court's decision in *People v DerMartzex*, 390 Mich 410; 213 NW2d 97 (1973). The trial court further ruled that it would allow testimony that the victim feared for her niece, as it provided an explanation for why the victim came forward when she did.

On appeal, defendant makes his argument under MRE 404(b) and additionally contends that *DerMartzex* does not support the proposition that evidence of prior sexual acts between a defendant and a minor are automatically admissible; relevancy must still be established and it was not shown here. We review a trial court's decision to admit other-acts evidence for an abuse of discretion; however, to the extent that the decision entails a preliminary question of law, such as whether a statute or rule of evidence precludes admission, our review is de novo. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007).

The issue presented is not properly analyzed under MRE 404(b). MCL 768.27a provides, in relevant part:

> (1) [I]n a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. . . .
>
> (2) As used in this section:
>
> (a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act [SORA], 1994 PA 295, MCL 28.722.
>
> (b) "Minor" means an individual less than 18 years of age.

MCL 768.27a was enacted pursuant to 2005 PA 135 and made effective January 1, 2006, which was more than three years before our trial. Accordingly, the statute is applicable; it matters not that the acts themselves occurred prior to January 1, 2006. *Pattison*, 276 Mich App at 618-619 (rejecting argument that application of MCL 768.27a at trial violated the Ex Post Facto Clause where the sexual abuse occurred before the statute took effect). Further, the offenses at issue here were committed against a minor, and the charged crime of CSC 2, as well as the prior bad acts, fall under the umbrella of listed offenses cited in the SORA. MCL 28.722(e)(*x*) (CSC crimes). We note that MCL 768.27a(1) does not, by its clear language, limit its applicability to past sexual acts committed against a minor who is not the victim in the present-day prosecution in which the acts are sought to be introduced. Rather, the statute is implicated when a defendant commits a SORA-listed offense against any minor. Therefore, it applies to past, uncharged sexual acts committed against the victim of the crime for which a defendant is currently being prosecuted.

"MCL 768.27a allows prosecutors to introduce evidence of a defendant's uncharged sexual offenses against minors without having to justify their admissibility under MRE 404(b)."

Pattison, 276 Mich App at 618-619. The statutory provision permits the introduction of evidence that previously would have been inadmissible as "it allows what may have been categorized as propensity evidence to be admitted[.]" *Id.* at 619. MCL 768.27a "reflects the Legislature's policy decision that, in certain cases, juries should have the opportunity to weigh a defendant's behavioral history and view the case's facts in the larger context that the defendant's background affords." *Id.* at 620. Having a complete picture of a defendant's history can shed light on the likelihood that a given crime was committed. *Id.* MCL 768.27a(1) expressly requires the evidence to be relevant, and the panel in *Pattison* also stated that MRE 403 needs to be considered. *Pattison*, 276 Mich App at 621. Under MRE 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."

Here, we hold that the evidence was relevant to show that the charged offense did not simply happen in a vacuum absent any history of contact, where the victim and defendant had been living together for quite some time before the date of the charged offense. That the evidence might have shown defendant's propensity to commit sexual acts against minors does not make the evidence inadmissible under MCL 768.27a. Indeed, propensity constitutes another acceptable and relevant purpose to have used the other-acts evidence. Additionally, the victim testified that she came forward and told her mother about the molestation because she feared for her five-year-old niece, which testimony we conclude was properly admitted for reasons discussed below. Given the young age of the niece, the victim's testimony of sexual contact beginning at age eight, and not solely at age 13, lent support and credence to the victim's claim that she first told her mother about the abuse because of concern for her niece. Absent the other-acts evidence, the jury could realistically have been left with the impression that defendant's sexual interests and actions were directed at teenage girls and not younger children, which in turn could have raised doubts about the victim's claim that she came forward out of concern for her five-year-old niece.

Further, we find that the probative value of the other-acts evidence was not substantially outweighed by the danger of unfair prejudice, MRE 403. The focus behind MRE 403 is whether the evidence was *unfairly* prejudicial, considering that evidence introduced by a prosecutor, and all relevant evidence for that matter, is inherently prejudicial to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Unfair prejudice refers to the tendency of evidence to adversely affect a defendant's position by injecting extraneous considerations such as jury bias, sympathy, anger, or shock. *Id.* at 75-76; *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984). While the other-acts evidence at issue here was prejudicial, we find that it was not unfairly prejudicial, nor was its probative value substantially outweighed by the danger of unfair prejudice. As stated by our Supreme Court in *DerMartzek*, 390 Mich at 413, "it has been held that the probative value outweighs the disadvantage where the crime charged is a sexual offense and the other acts tend to show similar familiarity between the defendant and the person with whom he allegedly committed the charged offense." "'Such previous facts are not only admissible and relevant, but they constitute a necessary part of such principal transaction – a link in the chain of testimony, without which it would be impossible for the jury properly to appreciate the testimony in reference to such principal transaction.'" *Id.* at 414 (citation omitted); see also *People v Dobek*, 274 Mich App 58, 88-89; 732 NW2d 546 (2007). In the case at bar, the trial court did not abuse its discretion in finding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

With respect to the testimony concerning the victim's niece, the testimony was relevant because it provided an explanation regarding why the victim came forward with her claims against defendant and the timing of the disclosure. And the testimony gave no hint or suggestion that defendant had actually engaged or attempted to engage in sexual acts with the niece. We hold that the trial court did not abuse its discretion in finding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. We would also note that, on this particular issue, other than making a cursory claim that the court erred in admitting the evidence, the body of defendant's appellate brief contains no substantive analysis or discussion.

Defendant next argues that the trial court erred in allowing the admission of defendant's taped interview with the police, where the interview consisted of totally irrelevant information concerning defendant's past marital relationship with the victim's mother, fatherhood, and defendant's relationship with a younger girlfriend whom he impregnated. Defendant also maintains that the interview contained inculpatory statements that were involuntarily given and induced by false promises of leniency. Further, defendant bootstraps an ineffective assistance of counsel claim, arguing that counsel should have objected to the playing of the tape.

The record reveals that the tape played for the jury had been heavily redacted *as agreed to by the parties*. At the start of the first day of trial, defendant indicated his agreement to playing the tape for the jury, and the only dispute concerned whether there should be any commentary explaining to the jurors why the tape appeared so choppy, as caused by the editing and redacting. Accordingly, any appellate challenge to the admission of the tape was waived by defendant and cannot form a basis for reversal. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). However, we must still consider defendant's argument that counsel was ineffective for failing to challenge the admission of the taped interview.

Whether a defendant has been denied the effective assistance of counsel presents a mixed question of fact and law, which matters are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court recited the basic principles applicable to a claim of ineffective assistance of counsel, stating:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the

> defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

With respect to those portions of the tape concerning defendant's past marital relationship with the victim's mother, fatherhood, and defendant's relationship with a younger girlfriend whom he impregnated, we find that defendant has failed to overcome the strong presumption that counsel's decision not to object and to effectively waive the issue constituted sound trial strategy. Defendant used some of this information to support a defense that the victim had ulterior motives for accusing defendant of sexual assault, including punishing defendant for cheating on her mother with the girlfriend. Further, defendant has failed to establish the requisite prejudice, assuming counsel's performance was deficient.

With respect to the inculpatory statements made in the taped interview, which were also testified to by the interrogating detective, the United States Supreme Court has stated that police ploys to mislead a suspect or to lull him or her into a false sense of security that do not rise to the level of compulsion or coercion are constitutionally permissible. *Illinois v Perkins*, 496 US 292, 297; 110 S Ct 2394; 110 L Ed 2d 243 (1990). The question is whether a confession was freely and voluntarily given, and a confession cannot be extracted by threats or violence, nor obtained by direct or implied promises. *People v Daoud*, 462 Mich 621, 632; 614 NW2d 152 (2000). A court must examine the totality of the circumstances in determining whether a confession was free and voluntary. *Id.* at 634. Here, while the detective used misleading ploys and attempted to lull defendant into a false sense of security by downplaying the seriousness of defendant's actions, we find, under the totality of the circumstances, that the inculpatory statements were freely and voluntarily given and were not the result of compulsion or coercion. Because counsel need not make futile objections, *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002), we reject defendant's claim of ineffective assistance of counsel.

Finally, defendant argues that the trial court misscored prior record variable (PRV) 2, MCL 777.52 (prior low severity felony convictions), PRV 5, MCL 777.55 (prior misdemeanor convictions), and offense variable (OV) 13, MCL 777.43 (continuing pattern of criminal behavior).

The scoring of the sentencing guidelines variables is determined by reference to the record, using the preponderance of the evidence standard. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). "[T]his Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score." *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009) (citation omitted).

The record reflects that a sentencing hearing was held on July 14, 2009; however, the file does not include a transcript of the hearing. A sentencing memorandum filed by the prosecution on August 7, 2009, states that defendant had raised objections at the July 14 sentencing hearing with respect to PRVs 2 and 5 and OV 13. Apparently, the trial court adjourned the hearing after defendant raised the objections, allowing time for the parties to develop and sharpen their arguments. PRV 2 was scored at 10 points, PRV 5 was scored at 5 points, and OV 13 was scored at 25 points. The prosecution's sentencing memorandum indicates that defendant

objected to PRVs 2 and 5 on the basis that past convictions were too old to consider and that defendant objected to OV 13 on the basis that the evidence failed to show three or more crimes against a person within the requisite five-year period. On August 11, 2009, the sentencing hearing was continued. Defendant complained that there was nothing that showed the exact date of the crime, making it impossible to determine whether prior convictions were too old to consider for purposes of the PRVs. The trial court stated that it was within its discretion to score the variables, and it found that the scores were appropriate. The minimum sentencing range was 29 to 71 months' imprisonment. See MCL 777.64 (grid for class C offenses) and MCL 777.21(3)(a) (modification of grid range for second-habitual offenders). The trial court imposed a minimum sentence of 60 months.

We have reviewed the presentence investigation report (PSIR), and it reveals that defendant was convicted by plea of larceny from a building (felony) in July 1980 and sentenced to four years' probation and 60 days in jail. Defendant's discharge date was August 21, 1984. Next, defendant was convicted of first-degree retail fraud (felony) in July 1989 and sentenced to four years' probation, but he violated probation in August 1990 and was given 90 days in jail, with probation being revoked. In September 1990, defendant was convicted by plea of operating a motor vehicle while intoxicated (misdemeanor) and sentenced to 45 days in jail. In November 1992, defendant was convicted by plea of possession of marijuana (misdemeanor) and sentenced to 12 months' probation. The discharge date on the drug possession conviction and sentence is listed as November 1, 1993. The parties' arguments are framed around this last conviction.

PRV 2 provides for a score of 10 points, which was scored here, where an "offender has 2 prior low severity felony convictions." MCL 777.52(1)(c). PRV 5 provides for a score of 5 points, which was scored here, where an "offender has 2 prior misdemeanor convictions . . . ." MCL 777.55(1)(d). MCL 777.50 applies to the scoring of PRVs 1 through 5, and subsection (1) provides that the statute precludes the use of "any conviction . . . that precedes a period of 10 or more years between the discharge date from a conviction . . . and the defendant's commission of the next offense resulting in a conviction . . . ."[1] MCL 777.50(2) provides further elaboration and explanation in relation to subsection (1):

> Apply subsection (1) by determining the time between the discharge date for the prior conviction . . . most recently preceding the commission date of the sentencing offense. If it is 10 or more years, do not use that prior conviction . . . and any earlier conviction . . . in scoring prior record variables. If it is less than 10 years, use that prior conviction . . . in scoring prior record variables and

[1] The discharge date is "the date an individual is discharged from the jurisdiction of the court or the department of corrections after being convicted of . . . a crime . . . ." MCL 777.50(4)(b). When a discharge date is not available, "add either the time defendant was sentenced to probation or the length of the minimum incarceration term to the date of the conviction and use that date as the discharge date." MCL 777.50(3).

> determine the time between the commission date of that prior conviction and the discharge date of the next earlier prior conviction . . . . If that period is 10 or more years, do not use that prior conviction . . . and any earlier conviction . . . in scoring prior record variables. If it is less than 10 years, use that prior conviction . . . in scoring prior record variables and repeat this determination for each remaining prior conviction . . . until a period of 10 or more years is found or no prior convictions . . . remain.

Thus, the statute creates 10-year windows that can potentially capture any crime previously committed. In *People v Billings*, 283 Mich App 538, 551; 770 NW2d 893 (2009), the defendant committed an offense in 2006 and was sentenced in 2007, and he argued that it was improper to consider adjudications in 1975 and 1978 in scoring the PRVs. This Court, after quoting MCL 777.50, held:

> [T]he issue is not whether 10 years had passed between the discharge from his 1975 juvenile adjudication and the present offense, but whether, starting with the present offense, there was ever a gap of 10 or more years between a discharge date and a subsequent commission date that would cut off the remainder of his prior convictions or juvenile adjudications. Our review of the record indicates that no such 10-year period exists. [Defendant's] greatest gap between one discharge and subsequent commission was a discharge in 1997 with a subsequent commission in 2005. Because no gap of 10 or more years ever cut off the progression, all of [defendant's] juvenile convictions were properly included under the rule. [*Billings*, 283 Mich App at 552.]

Here, the misdemeanor conviction for possession of marijuana had a discharge date of November 1, 1993. The ten-year period would run up to November 1, 2003. The date of the CSC 2 offense was set in the charging documents as having occurred between October 2003 and October 2004. It was on October 3, 2003, that the victim turned 13 years old, which was the trigger age for implicating MCL 750.520c(1)(b)(*ii*); the provision under which defendant was charged. Given that the victim testified that she was sexually assaulted by defendant about once every couple of weeks when she was 13 years old, one or two of those assaults would have occurred between October 3 and November 1, 2003. Thus, the misdemeanor marijuana conviction could be considered because it fell within the ten-year window between the date of discharge on that conviction and the date of the CSC 2 offense.

PRV 2 concerns "prior low severity *felony* convictions, and PRV 5 concerns "prior *misdemeanor* convictions." (Emphasis added.) And the scoring of those variables at 10 points and 5 points, respectively, required two prior low severity felony convictions and two prior misdemeanor convictions. We have concluded above that the misdemeanor conviction for marijuana possession can be used in scoring the PRVs under MCL 777.50, and the conviction can be recognized as one of the prior misdemeanor convictions for purposes of PRV 5. Because less than 10 years elapsed between the marijuana conviction and discharge from the misdemeanor drunk driving conviction, the drunk driving conviction is reachable under MCL 777.50, and the drunk driving conviction can be recognized as the second prior misdemeanor conviction for purposes of PRV 5. Because less than 10 years elapsed between the drunk driving conviction and discharge from the conviction for first-degree retail fraud, which is a low severity

felony, MCL 777.52(2)(a) and 777.16r, the retail fraud conviction is reachable under MCL 777.50, and the retail fraud conviction can be recognized as one of the prior low severity felony convictions for purposes of PRV 2. Because less than 10 years elapsed between the retail fraud conviction and discharge from the conviction for larceny from a building, which is a low severity felony, MCL 777.52(2)(a) and 777.16r, the larceny conviction is reachable under MCL 777.50, and the larceny conviction can be recognized as the second low severity felony conviction for purposes of PRV 2. Accordingly, PRVs 2 and 5 were accurately scored.

Finally, with respect to OV 13, a score of 25 points is proper where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). "For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). "[O]nly those crimes committed during a five-year period that encompasses the sentencing offense can be considered." *People v Francisco*, 474 Mich 82, 86; 711 NW2d 44 (2006). Defendant here contends that the victim's testimony failed to specify dates, such that it would be pure speculation to find that three offenses, which necessarily would include the CSC 2 offense, occurred within a five-year timeframe.

The evidence, let alone the verdict of the jury, established that a CSC 2 occurred after the victim turned 13 years old. The victim testified that defendant engaged in sexual contact with her about once every two weeks while she was 13 and about once every few days during her earlier years. As indicated above, a conviction is unnecessary for scoring OV 13. The victim's testimony as to the frequency of improper sexual contact, when viewed in relationship to the date of the offense upon which defendant was convicted, constituted sufficient evidence showing a pattern of felonious criminal activity involving 3 or more crimes against a person, as necessary to score 25 points for OV 13.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher